United Nations A/CN.9/812

General Assembly

Distr.: General
4 March 2014

Original: English

United Nations Commission on International Trade Law
Forty-seventh session
New York, 7-25 July 2014

Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration

Note by the Secretariat

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission entrusted its Working Group II with the task of preparing a legal standard on transparency in treaty-based investor-State arbitration.[1] At its forty-fourth session (Vienna, 26 June-8 July 2011), the Commission confirmed that the question of applicability of the rules on transparency under preparation to investment treaties concluded before the date of coming into effect of such rules ("existing investment treaties") was part of the mandate of the Working Group and a question of great practical interest, taking account of the high number of investment treaties currently in existence.[2] In that context, the Working Group discussed the options of making the rules on transparency applicable to existing investment treaties either by way of a convention, whereby States could express consent to apply the rules on transparency to arbitrations arising under their existing investment treaties, or by a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement. The possibility of making the rules on transparency applicable to existing investment treaties by joint interpretative declaration pursuant to article 31(3)(a) of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention"), or by an amendment or modification of a relevant treaty pursuant to articles 39-41 of the Vienna Convention, was also considered by the Working Group.[3]

2. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency" or "Rules"), together with the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013). The Commission, in its decision adopting the Rules on Transparency, recommended, inter alia, "that, subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties."[4]

3. At that session, the Commission recorded consensus to entrust the Working Group with the task of preparing a convention ("convention" or "transparency convention") on the application of the Rules on Transparency to existing investment

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

[2] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200. For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 3 March 2014 at www.unctadxi.org/templates/DocSearch____779.aspx.

[3] References to the reports of the Working Group where application of the Rules on Transparency to existing investment treaties was discussed: A/CN.9/712, paras. 85-94; A/CN.9/717, paras. 42-46; A/CN.9/736, paras. 134 and 135; A/CN.9/760, para. 141; A/CN.9/765, para. 14. Notes by the Secretariat on the matter: A/CN.9/WG.II/WP.162, paras. 22-40; A/CN.9/WG.II/WP.166/Add.1, paras. 10-23; A/CN.9/WG.II/WP.169/Add.1, paras. 36-41; A/CN.9/WG.II/WP.176/Add.1, paras. 14-34.

[4] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 116.

treaties, taking into account that the aim of the convention was to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.[5]

4. At its fifty-ninth (Vienna, 16-20 September 2013) and sixtieth (New York, 3-7 February 2014) sessions,[6] the Working Group completed its first and second readings of the transparency convention. In accordance with the request of the Working Group at its sixtieth session, this note contains an annotated draft of the transparency convention, based on the deliberations and decisions of the Working Group (A/CN.9/799, para. 13).

II. Draft convention on transparency in treaty-based investor-State arbitration

A. Text of the draft convention on transparency

5. The draft text of the convention on transparency reads as follows.

"***Preamble***

"*The Parties to this Convention,*

"*Recognizing* the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,

"*Also recognizing* the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

"*Believing* that the Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 ("UNCITRAL Rules on Transparency"), effective as of 1 April 2014, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,

"*Noting* the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded investment treaties,

[5] Ibid., para. 127.

[6] References to the reports of the Working Group: A/CN.9/794 and A/CN.9/799. Notes by the Secretariat: A/CN.9/784; A/CN.9/WG.II/WP.179; A/CN.9/WG.II/WP.181.

"*Have agreed as follows*:

"***Scope of application***

"***Article 1***

"1. This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014 ('investor-State arbitration').

"2. The term 'investment treaty' means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.

"***Application of the UNCITRAL Rules on Transparency***

"***Article 2***

"*Bilateral or multilateral application*

"1. The UNCITRAL Rules on Transparency[, as they may be revised from time to time,] shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a).

"*Unilateral offer of application*

"2. Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency[, as they may be revised from time to time,] shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.

["*Applicable version of the UNCITRAL Rules on Transparency*

"3. Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the arbitral tribunal shall apply the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2).]

"*Article 1(7) of the UNCITRAL Rules on Transparency*

"4. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor-State arbitrations under paragraph 1.

"*Most favored nation provision in an investment treaty*

"5. The Parties to this Convention agree that a claimant may not invoke a most favored nation provision to seek to alter the application [or non-application] under this Convention of the UNCITRAL Rules on Transparency.

"***Reservations***

"***Article 3***

"1. A Party may declare that:

(a) a specific investment treaty, identified by title, name of contracting parties to that investment treaty, and date that investment treaty was concluded, shall not be subject to this Convention;

(b) article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;

(c) article 2(2) shall not apply in investor-State arbitration in which it is a respondent.

"2. In the event of amendment to the UNCITRAL Rules on Transparency, a Party may, within six months of the adoption of such amendment, declare that it will not apply that revised version of the Rules.

"3. No reservations are permitted except those expressly authorized in this article.

"***Formulation of reservations***

"***Article 4***

"1. Reservations may be made by a Party at any time, save for a reservation under article 3(2).

"2. Reservations and their confirmations shall be formally notified to the depositary.

"3. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

"4. Except for a reservation under article 3(2), which shall take effect immediately upon receipt by the depositary, a reservation of which the depositary receives formal notification after the entry into force of the Convention for that Party shall take effect twelve months after the date of its receipt by the depositary.

"5. Any Party that makes a reservation under this Convention may withdraw or modify it at any time. Such modifications or withdrawals are to be formally notified to the depositary.

"6. If, after this Convention has entered into force for a Party, that Party withdraws a reservation or modifies any existing reservation to this Convention with the effect of making such a withdrawal, such withdrawal or modification shall take effect upon receipt of the notification by the depositary.

"7. Any modification of a reservation not falling under paragraph 6 shall take effect twelve months after the date of receipt of the notification by the depositary.

"***Application to investor-State arbitrations***

"***Article 5***

"This Convention and any reservation, or any modification to, or withdrawal of, a reservation, apply only to investor-State arbitrations that have been commenced after the date when the Convention, reservation, or any modification to, or withdrawal of, a reservation, enters into force or takes effect in respect of each Party.

"***Depositary***

"***Article 6***

"The Secretary-General of the United Nations is hereby designated as the depository of this Convention.

"***Signature, ratification, acceptance, approval, accession***

"***Article 7***

"1. This Convention is open until [date] for signature by any (a) State; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty.

"2. This Convention is subject to ratification, acceptance or approval by the signatories to this Convention.

"3. This Convention is open for accession by all States or regional economic integration organizations referred to in paragraph 1 which are not signatories as from the date it is open for signature.

"4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

"***Participation by regional economic integration organizations***

"***Article 8***

"1. When depositing an instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall inform the depository of a specific investment treaty to which it is a contracting party, identified by title, name of contracting parties to that investment treaty, and date that investment treaty was concluded.

"2. When the number of Parties is relevant in this Convention, a regional economic integration organization does not count as a Party in addition to its member States which are Parties.

"***Entry into force***

"***Article 9***

"1. This Convention enters into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

"2. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this

Convention enters into force in respect of that State or regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

"***Amendment***

"***Article 10***

"1. Any Party may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to this Convention with a request that they indicate whether they favor a conference of Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties favor such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

"2. The conference of Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no consensus has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties present and voting at the conference.

"3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Parties for ratification, acceptance or approval.

"4. An adopted amendment enters into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties which have expressed consent to be bound by it.

"5. When a State or a regional economic integration organization ratifies, accepts or approves an amendment that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance or approval.

"6. Any State or regional economic integration organization which becomes a Party to the Convention after the entry into force of the amendment shall be considered as a Party to the Convention as amended.

"***Denunciation of this Convention***

"***Article 11***

"1. A Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary. The denunciation shall take effect twelve months after the notification is received by the depositary.

"2. This Convention shall continue to apply to investor-State arbitrations commenced before the denunciation takes effect.

"DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

"IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorised [by their respective Governments], have signed the present Convention."

B. Annotations to the draft convention on transparency

Remarks on the draft preamble

6. At its sixtieth session, the Working Group approved the substance of the preamble set out in paragraph 5 above (A/CN.9/799, paras. 16-20; for deliberations on the preamble at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 33-43).

7. For the sake of drafting consistency, the word "investment" is proposed to be added after the word "concluded" in the fourth paragraph of the preamble. In addition, the Commission may wish to consider whether the phrase "Noting also article 1(2) and (9) of the UNCITRAL Rules on Transparency," should be inserted as a last paragraph of the preamble in order to clarify that the purpose of the convention is to provide a mechanism for the application of the Rules on Transparency to existing investment treaties, and to arbitrations initiated under the UNCITRAL Arbitration Rules, other sets of rules or in ad hoc proceedings.

8. The Commission may wish to note the decision of the Working Group at its fifty-ninth and sixtieth sessions that the mandate given by the Commission to the Working Group (as recalled above, in para. 3) would not be included in the preamble of the transparency convention, but rather, that text along the following lines would be included in the proposal for the General Assembly resolution recommending the transparency convention: "Recalling that the Commission recommended that the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties; Recalling that the Commission decided to prepare a convention that was intended to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention; Acknowledging that the Rules on Transparency might be made applicable to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency by means other than a convention ... Calls upon those Governments that wish to make the Rules on Transparency applicable to arbitrations under their existing investment treaties to consider becoming party to the Convention" (A/CN.9/794, para. 41; A/CN.9/799, para. 16).

9. As a matter of drafting, the Commission may wish to note that when referring party or parties to the convention, the word "Party" or "Parties" is used (A/CN.9/799, para. 135), and when referring to party or parties to an investment treaty, the words "contracting party" or "contracting parties" are used.

Remarks on draft article 1 — Scope of application

10. At its sixtieth session, the Working Group approved the substance of article 1 as set out in paragraph 5 above (A/CN.9/799, paras. 21-26; for deliberations on article 1 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 44-82). For the sake of drafting consistency, modifications have been made to article 1, as indicated in paragraph 14 below.

11. Article 1 deals with the material scope of application of the transparency convention and article 2 (formerly article 3) with the substantive obligations of Parties under the transparency convention.

12. At its fifty-ninth session, the Working Group agreed that the scope of application of the transparency convention should be drafted to give effect to the mandate given by the Commission, namely, to give those States that wished to apply the Rules on Transparency an efficient mechanism to do so, and moreover to promote transparency in treaty-based investor-State arbitration (A/CN.9/794, para. 56). A broad scope of application of the transparency convention was agreed on the basis that a Party could formulate specific reservations (pursuant to article 3, formerly article 5, of the transparency convention) limiting that scope of application (A/CN.9/794, paras. 28, 32; 44-66).

"Investment treaty"

13. At its sixtieth session, the Working Group agreed that the word "investment treaty" should be used in relation to the underlying investment treaties to which the convention would apply, and further agreed to retain the wording defining such treaties in article 1(2). The Working Group confirmed that the term "treaty" as defined in the Rules on Transparency, and "investment treaty" as defined in the transparency convention, had the same meaning and that the slight discrepancy in the definitions (as contained in the footnote to article 1 of the Rules, and in article 1(2) of the transparency convention respectively) was a result of the intention to give guidance to users of the Rules, but to have a precise definition in the convention (A/CN.9/794, para. 70; A/CN.9/799, para. 24).

Drafting matters

14. As matters of drafting concerning paragraph (1), following the decision of the Working Group at its sixtieth session that the convention should only address the application of the Rules on Transparency to existing investment treaties, the words "concluded before 1 April 2014" have been included (A/CN.9/799, paras. 83-86). In order to avoid repetitions in the text of the convention, a definition of "investor-State arbitration" has been inserted. Furthermore, following the decision of the Working Group to delete a provision stating that a reference to a "State" encompasses "regional economic integration organizations" (see below, paras. 23 and 44), paragraph (1) clarifies that the convention applies to arbitration between an investor and a State or a regional economic integration organization.

Remarks on draft article 2 — Application of the UNCITRAL Rules on Transparency [*formerly numbered article 3*]

15. Article 2 as set out in paragraph 5 above is based on draft proposals made at the sixtieth session of the Working Group (A/CN.9/799, paras. 113, 116, 119

and 124) and was approved in substance by the Working Group at that session (A/CN.9/799, paras. 29-47; 88-128; for deliberations on article 2 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 89-114). Paragraph (3) is a new proposal which aims at clarifying the application of the reservation under article 3(2) (see below, para. 24). The Commission may wish to consider the proposed titles in relation to each paragraph of that article.

Nature and effect of the transparency convention in relation to existing investment treaties

16. At its fifty-ninth session, the Working Group considered in broad terms the nature and effect of the transparency convention in relation to existing investment treaties, and specifically whether the transparency convention, upon coming into force, would constitute a successive treaty creating new obligations (pursuant to article 30 of the Vienna Convention), or whether it would constitute an amendment of, or modification to, existing investment treaties (subject to amendment or modification provisions of those treaties and to which Part IV of the Vienna Convention would apply as a secondary source of law) (A/CN.9/794, paras. 17-22; see also A/CN.9/WG.II/WP.179, paras. 5-7). At that stage of deliberations, it was noted that a great number of delegations were inclined to view the transparency convention as a successive treaty pursuant to article 30 of the Vienna Convention (A/CN.9/794, para. 22).

Paragraphs (1) and (2)

17. Paragraphs (1) and (2) address the request of the Working Group to keep separate the effect of the transparency convention where the claimant of a State that is Party to the convention, and the respondent, Party to the convention, have both agreed to the application of the Rules on Transparency pursuant to the convention (paragraph (1)), and the effect when only the respondent, Party to the convention has agreed to the application of the Rules on Transparency (paragraph (2)).

18. Paragraph (1) reflects the decision of the Working Group that the transparency convention should apply on a reciprocal basis as between Parties to the convention, and specifically that in order for the Rules on Transparency to apply in an investor-State arbitration, both the respondent and the State of the claimant would have to be Party to the convention and not have excluded from the application of the convention the investment treaty under which the claim arises (reservation under article 3(1)(a)) (A/CN.9/799, paras. 29-38 and 97-128). The Rules on transparency would then apply if the arbitration rules under which the dispute is initiated have not been excluded from the scope of application of the Convention by the respondent (reservation under article 3(1)(b)).

19. Linking the scope of application of the convention under paragraph (1) to reservations made by the respective Parties ensures the functioning of the regime of reciprocity set out in paragraph 17 above. Thus under paragraph (1), the Rules on Transparency would only apply under the convention where both parties to a dispute are from Parties to the convention, neither of those Parties have made a reservation under article 3(1)(a) and the respondent has not made a reservation applicable to that dispute under article 3(1)(b).

20. Paragraph (2) would apply when the requirement of reciprocity had not been fulfilled (because the State of that claimant had made a reservation applicable to the dispute, or because the State of the claimant was not a Party to the convention) and provides for a general unilateral offer by the respondent to those claimants to use the Rules on Transparency where the Party of the respondent has not formulated a reservation applicable to the dispute (A/CN.9/794, paras. 23-29; 48; 104-114).

21. The Commission may wish to consider the following proposal as an alternative wording for paragraph (2) which aims at clarifying the purpose of that provision, without altering its content: "Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1 and the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), a claimant may agree to apply those Rules[, as they may be revised from time to time,] to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules."

"As they may be revised from time to time"

22. The Commission may wish to consider whether the words in brackets in paragraphs (1) and (2) "as they may be revised from time to time" should be deleted as the matter of application of the Rules on Transparency in the event of revision is addressed under paragraph (3) and article 3(2) (see below, para. 24).

"State that is a Party"

23. The Commission may wish to note that the term "claimant is of a State that is a Party" used in paragraph (1) provides that regional economic integration organizations are only subject to the scope of application of paragraph (1) to the extent that they are the respondent in a dispute (A/CN.9/794, para. 95; A/CN.9/799, paras. 129-133). That solution was adopted on the basis that (i) it would allow for a streamlined provision on participation by regional economic integration organizations (article 8); (ii) it would rectify a possible lack of clarity when a claimant was from a State member of a regional economic integration organization and consequently from two "Parties" to the transparency convention; and (iii) any limitation imposed by that wording would in effect relate only to a very limited and narrow set of circumstances — namely, to investor-State arbitration under the Energy Charter Treaty (A/CN.9/799, para. 132). The Commission may wish to consider that there could be other existing investment treaties to which regional economic integration organizations would be party and to which the convention would apply; furthermore, the Working Group noted that if after further examination it appeared that the text created difficulties in other circumstances outside the Energy Charter Treaty, that solution might need to be reconsidered (A/CN.9/799, para. 133).

Paragraph (3)

24. Paragraphs (1) and (2) include provisions on the application of the reservations under article 3(1), but are silent on the reservation under article 3(2). Paragraph (3) has been inserted to rectify that asymmetry and furthermore to clarify how the reservation under article 3(2) affects the scope of application. If the Commission decides to retain paragraph (3), it is suggested that the words "as they

may be revised from time to time" could be deleted from paragraphs (1) and (2) (see above, para. 22).

Paragraph (4)

25. Paragraph (4) aims to ensure that the last sentence of article 1(7) of the Rules on Transparency — which reads, "Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail" — does not serve to nullify the effect and purpose of the transparency convention (A/CN.9/794, paras. 77, 79, 101, 109-112; A/CN.9/799, paras. 39, 121 and 122). Paragraph (4) is not applicable to unilateral offers under article 2(2) of the convention.

Paragraph (5)

26. The purpose of inserting a provision relating to most favoured nation ("MFN") clauses in the transparency convention is to clarify that a claimant could not (i) avoid application of the Rules on Transparency by invoking an MFN clause to claim that the non-transparent dispute resolution provisions of another treaty were more favourable to it; or (ii) conversely invoke an MFN clause to make the Rules on Transparency applicable to its arbitration in circumstances where the Rules would not otherwise apply (A/CN.9/794, paras. 118-121; A/CN.9/799, paras. 40-46, 88-96; 123 and 124). The words "non-application" have been put in square brackets. The Commission may wish to consider whether to delete those words, considering that the alteration of the non-application of the Rules on Transparency might be difficult to understand.

Remarks on draft articles 3 — Reservations [*formerly numbered article 5*]

27. At its sixtieth session, the Working Group approved the substance of article 3 as set out in paragraph 5 above (A/CN.9/799, paras. 51-55; 97-128; for deliberations on article 3 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 115-147). It is based on draft proposals made at that session (A/CN.9/799, paras. 114, 126-128).

28. At its fifty-ninth session, the Working Group considered that the matters on which reservations could be made under the transparency convention were (i) exclusion of certain investment treaties from the application of the transparency convention; (ii) exclusion of arbitration initiated under certain arbitration rules; (iii) exclusion of the application of the provisions of article 2(2); and (iv) reserving out of the application of a revised or amended version of the Rules on Transparency. These reservations would limit the scope of application of the convention (A/CN.9/794, paras. 116 and 117).

29. The Commission may wish to note the unanimous agreement of the Working Group that it would be unacceptable for a Party to accede to the transparency convention and then carve out the entire content of the transparency convention by use of the reservations (A/CN.9/794, paras. 131-133).

Paragraph (1)

30. In relation to article 3(1)(a), the Working Group agreed that it would be contrary to the mandate given by the Commission to the Working Group to provide

that the transparency convention would apply only to investment treaties positively listed by States or regional economic integration organizations at the time of adoption; rather it would be for States or regional economic integration organizations wishing to carve out certain investment treaties from the transparency convention to list the excluded treaties in their reservation (A/CN.9/794, para. 122).

31. The effect of the reservation under article 3(1)(b) would be to limit the operation of the transparency convention to options to arbitrate under certain sets of arbitration rules in the reserving Party's investment treaties, it being understood that the UNCITRAL Arbitration Rules are excluded from the scope of that reservation (A/CN.9/794, paras. 138 and 139). The Commission may wish to note that article 3(1)(b) refers to "a specific" set of arbitration rules instead of "certain" sets of arbitration rules in order to mirror the drafting approach adopted in article 3(1)(a), and avoid the ambiguity of the word "certain" (A/CN.9/799, para. 126).

32. In relation to article 3(1)(c), a reservation in respect of the provisions of article 2(2) would mean that a Party is not willing to make a unilateral offer under the convention for the application of the Rules on Transparency. The Working Group affirmed that such a reservation would not be inconsistent with such a Party agreeing to the application of the Rules on Transparency to a specific arbitration in accordance with article 1(2)(a) of such Rules (A/CN.9/794, para. 113).

Paragraph (3)

33. In relation to paragraph (3), the Commission may wish to note the clear indication of consensus at the fifty-ninth and sixtieth sessions of the Working Group that the only reservations permitted ought to be those enumerated in the transparency convention (A/CN.9/794, para. 147; A/CN.9/799, para. 55).

Remarks on draft article 4 — Formulation of reservations [*formerly numbered article 6, and titled "Declarations and reservations"*]

34. Article 4 as set out in paragraph 5 above is based on draft proposals made at the sixtieth session of the Working Group and was approved in substance by the Working Group at that session (A/CN.9/799, paras. 56-69, 134(a) and 136; for deliberations on article 4 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 123-126, 149-152).

35. Article 4 provides that save for a reservation under article 3(2) in relation to an amendment to the Rules on Transparency, reservations may be made by a Party at any time (paragraph (1)); likewise, save for a reservation under article 3(2), reservations will take effect twelve months after the date of receipt by the depositary (paragraph (4)).

Paragraph (6)

36. In relation to paragraph (6), the Working Group agreed that a withdrawal providing for greater transparency ought to have immediate effect, whereas all other modifications ought to take effect twelve months after receipt by the depositary, in order to avoid abuse (paragraph (7)) (A/CN.9/799, paras. 63-69, 134(a) and 136; see also A/CN.9/794, paras. 153-157).

37. The Commission may wish to note that the wording in paragraph (6) as suggested during the sixtieth session of the Working Group read as follows: "If, after this Convention has entered into force for a Party, that Party: (a) withdraws or modifies a reservation made under article 3(1) so as to apply article 2(1) to investor-State arbitration under an additional investment treaty or to investor-State arbitration under additional arbitral rules or procedures; (b) withdraws a reservation made under article 3(2); such withdrawal shall take effect upon receipt of the notification by the depositary" (A/CN.9/799, para. 67). The Commission may wish to consider whether the revised text proposed in paragraph 5 above provides for more clarity.

Remarks on draft article 5 — Application to investor-State arbitrations [*formerly numbered article 12, and titled "Time of application"*]

38. At its sixtieth session, the Working Group approved the substance of article 5 as set out in paragraph 5 above. It reflects the drafting modifications agreed by the Working Group that ensure, inter alia, that a withdrawal of, or modification to, a reservation would not affect arbitrations already commenced at the time of that withdrawal or modification (A/CN.9/799, para. 76).

39. The Commission may wish to consider that that article has been relocated just after article 4, as article 4 determines the effective dates for reservations, modification or withdrawal thereof, and article 5 relates to the impact of such reservations, modifications or withdrawal thereof on arbitrations. For the sake of clarity, the title of that provision has been changed from "Time of application", to "Application to investor-State arbitrations".

40. The Commission may wish to note that the words "in respect of each Party" are intended to make it clear that the article refers to the time when the transparency convention would enter into force in respect of the Party in question, and not when the transparency convention would enter into force generally (A/CN.9/794, paras. 158 and 176; A/CN.9/799, para. 77).

Remarks on draft article 6 — Depositary [*formerly numbered article 7*]

41. At its fifty-ninth and sixtieth sessions, the Working Group approved the substance of article 6 as set out in paragraph 5 above (A/CN.9/799, para. 70; for deliberations on article 6 at the fifty-ninth session of the Working Group, see A/CN.9/794, para. 159).

Remarks on draft article 7 — Signature, ratification, acceptance, approval, accession [*formerly numbered article 8*]

42. At its sixtieth session, the Working Group approved the substance of article 7 as set out in paragraph 5 above (A/CN.9/799, paras. 71, 134(b) and 137; for deliberations on article 7 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 160-164).

Remarks on draft article 8 — Participation by regional economic integration organizations [*formerly numbered article 10*]

43. Article 8 as contained in paragraph 5 above is based on proposals made at the sixtieth session of the Working Group (A/CN.9/799, paras. 74, 129-133; for

deliberations on article 8 at the fifty-ninth session of the Working Group, see A/CN.9/794, paras. 168-170). Paragraph (1) addresses the decision of the Working Group that a provision should be included in the text of the convention providing that a regional economic integration organization should declare, at the time of adoption of, or accession to, the convention, that it is a Party to an investment treaty (A/CN.9/799, para. 137).

44. As set out further in paragraph 23 above, article 8 constitutes a compromise proposal. A definition of "Contracting Party", "Contracting Parties" or "State" in that article to encompass regional economic integration organizations was deleted, and language was added in article 3 to clarify that a claimant must be from a State that is a Party to the convention.

Remarks on draft article 9 — Entry into force [*formerly numbered article 11*]

45. Article 9 as set out in paragraph 5 above was approved in substance by the Working Group and it includes the drafting modifications agreed by the Working Group at its fifty-ninth (A/CN.9/794, paras. 171-175) and sixtieth (A/CN.9/799, para. 75) sessions. It reflects the consensus achieved in relation to the number of signatories to be required for the transparency convention to enter into force, that number being three (A/CN.9/794, para. 174).

Remarks on draft article 10 — Amendment [*formerly numbered article 13 and titled "Revision and amendment"*]

46. At its sixtieth session, the Working Group approved the substance of article 10 as set out in paragraph 5 above. It is based on drafting proposals made at that session (A/CN.9/799, paras. 78, and 138-146; for deliberations of the Working Group at its fifty-ninth session, see A/CN.9/794, paras. 177 and 178).

Remarks on draft article 11 — Denunciation of this Convention [*formerly numbered article 14*]

47. At its sixtieth session, the Working Group approved the substance of article 11 as set out in paragraph 5 above (A/CN.9/799, paras. 79-80; for deliberations on article 11 at the fifty-ninth session of the Working Group, see A/CN.9/794, para. 179).